

"Trump's statements express the same kind of populist opposition to constitutional court judges we have seen elsewhere"

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The judicial branch has a hard time in many countries these days. In the UK, the judges of the High Court have been labelled „enemies of the people“ on yellow-press front pages after they crossed the government in Brexit. In Poland the government has systematically subjugated the Constitutional Court and is about to do the same with the judiciary in general. These attempts are helped by a wide-spread sentiment that the judiciary is part of a self-serving liberal elite detached from "what the people want". Are we seeing something similar in the US?

We might, but in a much weaker sense than in Poland or even in the UK. We have not seen any legislative action against courts yet, as in Poland, nor have we seen press campaigns as in the UK. A federal judge in Seattle has blocked the realization of President Trump's so-called Muslim ban order, and the President in particular and a number of his supporters have verbally attacked the court. The statements by President Trump express the same kind of populist opposition to elitist constitutional court judges that we have seen elsewhere.

You are referring to the President's statement calling Judge Robart a "so-called judge"?

When you say "so-called" you are saying in essence this person really is not a judge even he is acting in a courtroom. It is a way of undermining the legitimacy of the actions that the judge has taken.

Do the government lawyers have a point when they claim that the executive order in question is a matter of foreign policy which under US constitutional law is the domain of widely unrestrained executive power?

The President does have quite a large scope of authority in the field of foreign affairs. But under the US constitutional system, even in the foreign affairs domain in some circumstances there are limitations on the scope of Presidential power imposed by other provisions in the Constitution. Some of those domains involve entry into the United States where there are some – often weak – constitutional limits on the procedures that the President can use. It is generally acknowledged that the two religion clauses of the Constitution, barring an establishment of religion and protecting free exercise of religion, do limit the President's authority to some extent in foreign affairs.

Is this a clear case of a breach of these provisions, or might the Seattle ruling still be overturned by a higher court in the end?

As a matter of formal legal doctrine, the President's position is defensible by professionally plausible arguments. I would not necessarily say that those arguments are stronger than the counter arguments. But one could develop a set of arguments that would support what the President has done, and it could be that the higher courts will protect them.

President Trump's advisor Rudy Giuliani has publicly declared on TV that he had been assigned to put up a commission to make a "Muslim ban" legally viable. Isn't that exactly the sort of smoking gun required to prove that this is in fact all about religious discrimination?

This statement is indeed one of the things that several judges have relied on as providing evidence that the order, although it does not refer in terms to Muslims, was designed to be a ban based on religious origin. If you say that that kind of evidence can override what is on the face of the order than that is a pretty strong case that the order is unlawful both under statutes and under the Constitution.

To which extent do you fear that there could be a real damage to the rule of law in the offing under this Presidency?

One incident is not enough. If there are more in other cases where courts rule against President Trump's initiatives and he responds in the same way by describing the judges as "so-called" judges or, as his Press Secretary Sean Spicer did during his press briefing, calling the ruling not merely wrong but "outrageous" and weakening the security of the nation, that might in fact lead to a substantial assault on judicial independence. I should also note that one of the things that is worrisome about this sort of rhetoric is not its direct effect on judges but its effect on licensing irresponsible individuals, vigilantes, to attack judges personally and physically. I suspect that the officials charged with protecting federal judges are now thinking about heightened risks for the judges and heightened security measures they need to take.

Have there been any incidents of that sort already?

Not yet. There have been individuals who have physically attacked and indeed murdered judges in the US over the past several decades, and the concern is that something similar might occur as a result of the President's rhetoric.

Have there been historical examples before for the executive branch openly defying the judiciary before in the US?

There are two kinds of things to distinguish. One is criticism of a pretty severe and targeted sort of judges for their rulings. The other is actual refusal to comply with an existing order. The latter is extremely rare in the US history. There is one example usually cited, which is President Lincoln ignoring a writ of habeas corpus on behalf of a confederate sympathizer at the beginning of the Civil War. As a technical matter, Lincoln actually did not defy the order because it had never been transmitted to him. But that is the strongest example of a President's defiance of an existing order. There are maybe a dozen examples through US history of severe criticism of particular decisions. President Andrew Jackson reportedly said that the Supreme Court has "made its decision, now let it enforce it", meaning that he was not going to help the court. He was not subject to the order at the time. President Franklin Roosevelt challenged the Supreme Court during the Great Depression. And there are scattered other examples of that kind. They typically do not take the form of casting doubt on the authority of the courts to issue the decisions rather than taking the form of criticizing the content of the decisions themselves.

Speaking of Andrew Jackson, who ignored a Supreme Court decision protecting the Native American Cherokee tribe: President Trump has declared great admiration for that particular predecessor and has hung a painting of him on a wall in the Oval Office as a token of esteem for him. What do you make of that?

President Jackson entered office seeking to disrupt the established routines of politics. That was essentially what he was interested in doing. He thought that the political system was in terms that we would now use rigged against a set of policies that he preferred, and rigged against the people who supported him. I think that President Trump probably admires Jackson for his disruptive efforts. Whether that extends to the particulars of responding to adverse Supreme Court decisions I do not know. Rather, I think it is more a general atmosphere of changing the way business is done in the White House.

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